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Attorneys:

Michael J. Klima, Jr. for Primus Automotive; and
Ronald L. Rowland for the debtor.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
STEVEN HALEY NASH,	)	Case No. 01-00205
	)	(Chapter 7)
Debtor.	)	

DECISION RE MOTION TO REOPEN

The debtor has sought to reopen this case in order to file a motion to avoid the garnishment lien of Primus Automotive on a $4,696.13 bank account at Suntrust Bank. The court will grant the motion on the condition that the debtor pay Primus's counsel an amount equal to the fees (based on an hourly rate) and expenses for the time spent by Primus's counsel in taking steps to enforce the garnishment lien after the case was closed, and in defending against the motion to reopen.

I

Based on the case file and the parties' stipulations at a hearing on the motion, the court finds the facts are these. In August 1999, Primus enforced a lien against the debtor's car by selling the car. In September 2000, Primus recovered a judgment against the debtor for $8,465.00 for the amount of the debt not satisfied by the sale of the car. In January 2001, Primus served a garnishment writ, issued by a Maryland state court, on Suntrust to seize and to create a lien upon the $4,696.13 bank account at

Suntrust.[1]

The debtor filed his bankruptcy petition pro se on February 2, 2001. On Schedule B (his schedule of personal property), the debtor scheduled an account at Suntrust, Adams Morgan, Washington, DC and under the column "CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION" he listed "-0-" as the value of the account. On Schedule E (his schedule of creditors holding unsecured claims), the debtor scheduled Primus as holding an unsecured claim of $8,465.00 incurred in September 2000. He did not schedule Primus as holding a secured claim on Schedule D (his schedule of creditors with secured claims). Question 4 of his Statement of Financial Affairs asked:

> 4. Suits and Administrative Proceedings, Executions, Garnishments and Attachments
>
> ☐ None a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
> GIVE CAPTION OF SUIT AND CASE NUMBER, NATURE OF PROCEEDING, COURT OR AGENCY AND LOCATION AND STATUS OR DISPOSITION.

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[1] The court does not decide whether Primus in fact achieved a lien. This is a question that turns on state law. See Cont'l Nat'l Bank of Miami v. Tavormina (In re Masvidal), 10 F.3d 761, 763 (11th Cir.1993) (lien under Florida statute, as then written, did not arise upon the service of a writ of garnishment, but only upon entry of judgment on writ of garnishment). The debtor seeks to avoid Primus's lien, if it has one, and the court will proceed on the assumption that Primus has a lien without adjudicating that it in fact does.

> ☐ None b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)
> GIVE NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED, DATE OF SEIZURE AND DESCRIPTION AND VALUE OF PROPERTY.

The debtor checked neither box, and in the blank area to the right of part "a" he wrote:

> Judgement Sept. 2000
> Primus Automotive
> District Court
> 0000029674

He did not provide any information in response to item "b" of Question 4.

On his Schedule C (his schedule of exemptions) he elected under 11 U.S.C. § 522(b)(1) to assert exemptions under 11 U.S.C. § 522(d), instead of electing under 11 U.S.C. § 522(b)(2) to assert nonbankruptcy law exemptions. He exempted $1,500 of tangible personal property (not including the Suntrust bank account) and he listed his homestead as exempt property, but failed to specify in the "VALUE OF CLAIMED EXEMPTION" column a value for that exemption. He listed the homestead's current market value without deducting exemption as $105,000. On Schedule A (his schedule of real property) he similarly valued the homestead as worth $105,000, and he scheduled the homestead as subject to a secured claim of $100,000, but on Schedule D (his schedule of creditors holding secured claims) he

scheduled the property as worth $100,400 and as subject to a lien of $100,753. In any event, the equity in the real property was thus scheduled as $5,000 or less. Even after exempting that equity, the debtor would have had plenty of exemption amounts available under 11 U.S.C. § 522(d)(5) to exempt the entire bank account at Suntrust.[2]

The debtor did not testify to explain whether the inaccuracies in his schedules and statement of financial affairs regarding Primus and the bank account were innocent mistakes. Primus, however, had not raised the inaccuracies of the debtor's bankruptcy papers as an issue prior to the hearing. Based on the debtor's disclosure of the Primus judgment, the court finds that the debtor, who was proceeding pro se when he commenced this case, did not deliberately treat Primus and the seized bank account improperly on his schedules and statement of financial affairs.

The state court entered judgment in favor of Primus against Suntrust after the bankruptcy case was filed, but that judgment was vacated by the state court based on the pendency of the bankruptcy case and the automatic stay of 11 U.S.C. § 362(a). The debtor was

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[2] The debtor filed his petition on February 2, 2001. Accordingly, the exemption amounts available in this case under § 522(d) had not been adjusted under § 11 U.S.C. § 104(b)(1). The amount exemptible under § 522(d)(5) was thus "$850 plus up to $8,075 of any unused amount of the exemption provided under paragraph (1) of this subsection." Under § 522(d)(1), the debtor could exempt his interest, "not to exceed $16,150 in value, in real property . . . that the debtor . . . uses as a residence . . . ."

obviously aware of the garnishment (it tied up the account) and became aware of the vacated judgment.

The debtor obtained his discharge under 11 U.S.C. § 727 on July 31, 2001. On August 15, 2001, the clerk entered an Order Discharging Trustee and Closing Fully-Administered, No Asset Case.

Sometime after receiving his discharge, or in anticipation of receiving it, the debtor contacted counsel for Primus and requested that Primus take steps to insure release of the bank account to the debtor. Primus's counsel advised the debtor that Primus had a judicial lien on the account, and that Primus declined to release the funds.

After this unsuccessful request, the debtor then employed counsel. This occurred sometime after the case was closed. The debtor's counsel filed a motion on the debtor's behalf in the state court requesting that the garnishment lien be released based on the discharge. The state court heard that motion on November 30, 2001. Primus appeared through counsel and defended on the proper ground that the lien was unaffected by the discharge (which has no effect on an in rem claim). Primus orally renewed its request for issuance of a judgment against Suntrust to pay over the seized account. The debtor's counsel then pointed out that the lien was avoidable under the Bankruptcy Code. The state court then granted the debtor until January 2, 2002, to file a motion to reopen the bankruptcy case in

order to pursue avoidance of the lien, and the debtor timely pursued that course.

Primus's counsel has incurred at least 8 hours of time since the closing of the bankruptcy case in defending against the debtor's motion in the state court, and in taking steps to enforce its garnishment lien, and in defending against the motion to reopen.[3] Primus's counsel is representing Primus on a contingency fee basis. His normal hourly billing rate (when he bills clients on an hourly basis) is $125 per hour, a clearly reasonable rate, and the 8 hours comes to $1,000 at that rate.

II

Primus does not contend that a proceeding for avoidance of a lien under § 522(f)(1)(A) is subject to any statute of limitations. Moreover, under 11 U.S.C. § 350(b), "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Such "cause" includes avoidance of a judicial lien under 11 U.S.C. § 522(f)(1)(A).

However, the reopening of a case is a discretionary decision for the court. See In re Bianucci, 4 F.3d 526, 528 (7th Cir. 1993); Hawkins v. Landmark Fin. Co., 727 F.2d 324, 326 (4th Cir. 1984).

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[3] The court assumes this includes the time preparing the opposition to the motion, as well as the preparation of a successful motion to vacate the court's initial granting of the motion to reopen. Primus is free to supplement the record if it does not.

"The key factor in determining whether to reopen a case to allow the avoidance of a lien pursuant to § 522(f) is whether the creditor is sufficiently prejudiced so that it would be inequitable to allow avoidance of a lien." In re Ricks, 89 B.R. 73, 76 (9th Cir. B.A.P. 1988).

The outcome in the reported decisions has not been uniform when the creditor shows that it incurred attorney's fees and expenses in pursuing enforcement of its lien after the debtor received a discharge. Some courts have refused to reopen a bankruptcy case when the creditor has incurred attorney's fees and expenses, after the debtor received a discharge, in seeking to enforce the lien in state proceedings. Bianucci, 4 F.3d at 529; Hawkins, 727 F.2d at 327. Others have reopened the case on the condition that the debtor reimburse the creditor for any costs and attorneys fees incurred as a result of enforcing its judicial lien in state court. See In re Parker, 64 B.R. 402, 404 (Bankr. M.D. Fla. 1986); Noble v. Yingling, 37 B.R. 647, 651 (D. Del. 1984). Finally, other courts have found that the incurring of such costs and fees, on the facts of the case, was not prejudice for which the debtor should be held responsible, and refused to condition reopening on the payment of the costs and fees. Ricks, 89 B.R. at 74-76.

In exercising the court's equitable discretion in deciding whether to reopen a case to permit a § 522(f) lien avoidance motion,

some courts consider the following nonexhaustive list of factors:

> 1) vigor with which the judgment creditors pursued the debtor prior to the filing of the bankruptcy petition, 2) communication of positions by and between debtor and judgment creditors after filing of the petition and prior to the discharge, 3) motivating cause of failure to file lien avoidance complaint prior to discharge, 4) length of time between discharge and filing of lien avoidance complaint, 5) reasons for delay in filing lien avoidance complaint, 6) prejudice to the judgment creditors, and 7) good faith, or lack thereof, of the creditors.

Noble v. Yingling, 29 B.R. 998, 1003 (D. Del. 1983). Prejudice to the judgment creditor may include the creditor's being put to added cost or difficulty, because of the passage of time, in proving facts relating to a defense to the motion to avoid the lien, but Primus has not suggested that there are factual issues with respect to the issue of the avoidability of its lien under § 522(f)(1)(A). Primus bears the burden of proof on the defense of laches, but the debtor, as the moving party, bears the burden of showing that reopening is otherwise justified.

In the D.C. Circuit, unless there has been irreparable prejudice, or willful misconduct, controversies should be decided on their merits, rather than by way of default. Thorpe v. Thorpe, 364 F.2d 692, 694 (D.C. Cir. 1966) ("the philosophy of modern federal procedure favors trials on the merits"). "[D]efault judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful." Id. The D.C. Circuit

additionally holds that as a condition to avoiding a default judgment, the trial court may require the defaulting party to pay the costs and fees incurred by the opposing party. Id. There should be no default if the court can avoid prejudice by conditioning a denial of default judgment on the defaulting party's paying its opponent's costs and fees incurred by reason of the default.

Winning by a default judgment is analogous to what Primus seeks to accomplish here via its request that the court deny the motion to reopen. The debtor is defending against a garnishment suit in state court. His defense is the avoidable character of the lien under 11 U.S.C. § 522(f). If this court does not allow the debtor to reopen the bankruptcy case, because of his default in seeking to avoid the lien before the case was closed, I would be precluding the debtor by reason of that default from pursuing his only viable defense in the garnishment proceeding. That would lead in the state court to a judgment, overriding the debtor's defense, and permitting Primus to recover from Suntrust the full amount of the bank account (a judgment whose payment would discharge Suntrust of any obligation to the debtor). In effect, the adverse judgment would be the result of this court's not relieving the debtor of his dilatoriness in pressing for lien avoidance in this court, and would be the equivalent of a default judgment.

Primus can only point to the prejudice to its attorney, who was

working on a contingency fee basis, in pursuing the state court litigation. Although Primus itself will not suffer any attorney's fees if the attorney makes no recovery on its behalf, Primus nevertheless can defend on the basis that there has been prejudice to its attorney. Primus has standing to defend against the motion to reopen, and the harm to the attorney is an appropriate matter to consider in the court's exercising its discretion as to whether to reopen the case. As noted in In re Swanson, 13 B.R. 851, 855 (Bankr. D. Idaho 1981) (quoting 27 Am.Jr.2d § 169, p. 712), a constituent of laches "is injury, prejudice, or disadvantage to the defendant **or to an innocent third person** in the event relief is granted to the complainant . . . ." [Emphasis added by this court.]

Unlike Ricks, 89 B.R. at 74, this is not a case in which the debtor ought not be held responsible for the time expended by the attorney. In Ricks, the primary reason the debtor Ricks did not avoid the creditor's lien prior to the closing of the case was because he did not know the lien existed. Ricks, 89 B.R. at 75. When the creditor contacted Ricks' attorney to inquire about the bankruptcy case, the creditor did not notify that attorney that it had a lien against Ricks' household goods. The debtor requested information regarding the lien, information (including a list of the collateral) that was necessary under the bankruptcy court's procedures to file an avoidance motion. The creditor then forwarded

some of the requested information, but not the list of collateral, and proceeded 14 days later to file its complaint in state court to enforce its lien. Moreover, the lien was against household goods that were plainly exemptible (and had been exempted), and hence the creditor's lien was plainly avoidable under § 522(f), leading the bankruptcy court to find that the creditor could not "reasonably explain its action of pursuing this debtor in state court on an obviously worthless and avoidable lien." Ricks, 89 B.R. at 76 (quoting bankruptcy court).

This case is different. The court infers that the debtor viewed his bank account as worthless, and scheduled it as having a zero value, because it was subject to Primus's judgment lien. So the debtor knew from the outset that there was a lien on the account. Moreover, when the debtor requested release of the bank account in connection with his obtaining a discharge, Primus advised the debtor that its lien was still enforceable despite the discharge. The debtor took no steps to amend his schedules to claim the bank account as exempt and to correct the amount of the bank account. Nor did he take any steps to avoid the lien until after Primus incurred fees in the state court.

The burden was not on Primus to scour the schedules in the bankruptcy case to determine whether the debtor would have the ability to exempt the bank account and recover it but for Primus's

lien. Given the amount involved, casting that burden on Primus would have added significantly to the time its attorney spent on pursuing enforcement of the lien. Had the debtor given some hint he intended to seek avoidance of the lien, that would be different.

Once the debtor filed his motion in the state court to release the lien on the basis only of the discharge, Primus was entitled to assume that the debtor had elected not to pursue § 522(f) relief, for whatever reason. Exemptions under § 522(b), and a debtor's right to avoid liens impairing an exemption, are not automatically exercised on the debtor's behalf by virtue of the filing of the bankruptcy petition. The debtor must claim an exemption, and the debtor must file a motion to avoid a lien impairing a right of exemption. When the debtor fails to do so and receives a discharge, and the case is closed, and the debtor does not signal his intention to seek avoidance of the lien under § 522(f), the creditor is not unreasonable if it then proceeds to enforce its lien.

The debtor initially proceeded pro se in this case. Although the court is sympathetic that he was probably unaware of his right to move for avoidance of Primus's lien, nevertheless, Primus was entitled to enforce its lien if the debtor neglected, even out of ignorance, to seek to avoid the lien. Primus had no duty to advise the debtor that he should consider whether the bank account was exemptible and whether the lien could be avoided, and indeed there is

no evidence that Primus knew that the bank account was exemptible and that the lien was avoidable. Because the debtor failed to signal an intention to seek to avoid the lien, and because the bank account was not of a character that would be obviously exemptible (like the household goods in Ricks), Primus was not unreasonable in seeking to enforce its lien.

Because Primus's attorney acted reasonably in defending against the debtor's state court motion to vacate the writ of garnishment, and in pursuing enforcement of Primus's lien, the prejudice to him ought to be redressed as a condition to the debtor's motion to reopen being granted. Because Primus will not recover any part of the Suntrust account, it would be unfair to use the contingency fee arrangement as the basis for imposing fees. Instead, fees and costs will be imposed based on the attorney's hourly fee charge and the actual expenses he incurred. The debtor has not contended that the $1,000.00 amount already proven is in excess of the contingency fee Primus's attorney would have recovered had Primus recovered the entire Suntrust account but for the belated motion to reopen. (That $1,000.00 is less than 22% of the $4,696.13 amount in the bank account.) Moreover, had the debtor filed a motion to avoid the lien before the closing of the case, Primus's attorney would not have been confronted with defending against the motion to reopen, an added expense that lien enforcement in the state court alone would not have

entailed, so it is inappropriate to limit the fees awarded by whatever the contingency fee arrangement was.

On the condition that the debtor pays Primus's attorney $1,000.00 (or such greater amount as that attorney establishes via affidavit), the court will reopen the case to permit the debtor to file a motion to avoid Primus's lien.

Primus is free within 21 days to file a supplemental affidavit regarding its attorney's fees and expenses occasioned by the debtor's failure to pursue lien avoidance prior to the closing of this case. The debtor will have 14 days to object to such fees and expenses.[4] If Primus does not so supplement the record, the court will direct reopening of the case to permit pursuit of a motion to avoid Primus's lien conditioned on the debtor's paying Primus's attorney $1,000.00. If Primus does so supplement the record, the court will then fix the added amount, if any, to be paid by the debtor as a condition to the reopening

of the case.[5] An interim order follows.

Dated: May 6, 2002.

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[4] The expenses are not limited to fixable costs. This is not an award of costs to a prevailing party, it is instead an attempt to make Primus's attorney whole.

[5] The court's order will direct that unless requested by the United States Trustee or some other party in interest, the court will not direct the appointment of a trustee in the reopened case.

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S. Martin Teel, Jr.
United States Bankruptcy Judge

Copies to:

Office of the U.S. Trustee
115 S. Union Street
Suite 210
Alexandria, VA 22314

Michael J. Klima, Jr., Esq.
Suite 444, World Trade Center
401 E. Pratt Street
Baltimore, MD 21202-3091

Ronald L. Rowland, Esq.
The Rowland Law Firm
4313 Hamilton Street
Hyattsville, MD 20781

Marjorie A. Corwin, Esq.
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander, LLC
The Garrett Building
233 E. Redwood Street
Baltimore, MD 21202

Wendell Webster
Chapter 7 Trustee
1819 H Street, Suite 300
Washington, D.C. 20006